Supreme Court, U.S.
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No. 03-1500

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE, THOMAS MORE LAW CENTER, IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Thomas More Law Center is a national, non-profit, public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the sanctity of human life, time-honored values, and the religious freedom of Christians, including the display of the Ten Commandments on public property. The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities.[1]

As part of its litigation efforts, the Thomas More Law Center has represented government entities in federal court in defense of lawsuits seeking to remove Ten Commandments monuments from public property. The Thomas More Law Center also has submitted amicus curiae briefs in this Court and in the United States Court of Appeals for the Sixth Circuit, Seventh Circuit, and the Eleventh Circuit in support of the public display of Ten Commandments monuments. Accordingly, the Thomas More Law Center has an interest and an expertise in this area of the law, which will be of assistance to this Court in deciding this case.

The Thomas More Law Center appears as amicus curiae in support of respondents and urges this Court to

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[1] This brief is being filed with the consent of all parties. Copies of the consent letters have been submitted to this Court. Sup. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporation and no stock. Sup. Ct. R. 29.6.

uphold the ruling of the lower court in favor of respondents.

SUMMARY OF THE ARGUMENT

This case presents this Court with the opportunity to re-evaluate *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), a weak precedent, that involved the display of the Ten Commandments in a public school setting. Although *Stone* is limited to the public school context, lower courts have wrongly considered *Stone* when deciding cases involving the display of the Ten Commandments in non-public school contexts. This Court should clarify the applicability, if any, of *Stone* when it comes to deciding cases involving the Ten Commandments in non-public school contexts.

ARGUMENT

This Court has never decided a case that involves the display of the Ten Commandments, whether alone or in a broader context, as in the instant case, in a non-public school context. In *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), this Court considered a Kentucky statute that required school officials to post a copy of the Ten Commandments *alone* on the wall of *each public school classroom* in Kentucky. *Id.* at 39. This Court summarily struck down the law, holding that it served no secular purpose, even though the Kentucky Legislature had required the following statement of secular purpose to appear at the bottom of each display: "'The secular application of the Ten Commandments is clearly seen in its

adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" *Id.* at 41.

Despite the Kentucky Legislature's clearly stated (and accurate) secular purpose for the display, this Court nevertheless summarily wrote:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.

Id. at 41. This Court, therefore, concluded that the Kentucky statute in question violated the first prong (the purpose prong) of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and consequently violated the Establishment Clause.[2] *Id.* at 42-43.

In reaching its ruling in *Stone*, apart from referencing *Lemon*, this Court relied only on public school prayer cases, *id.* at 40-43 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading and Lord's Prayer), and *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer)), thus indicating that this Court viewed *Stone* as a public school

[2] Justices of this Court have criticized *Lemon*, and the time has come for this Court to re-evaluate *Lemon* as a viable precedent. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-20 (2000) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting) (explaining that "*Lemon* has had a checkered career in the decisional law of this Court" and collecting Supreme Court opinions criticizing *Lemon* and noting further that this Court has stated that *Lemon* is not binding on it).

prayer case in concluding that the Kentucky Legislature's requirement that the Ten Commandments be posted on the classroom walls was purely a religious admonition along the lines of the religious practices prohibited in *Schempp* and *Engel*.

Even though *Stone* is essentially a public school prayer case and is limited to the public school context with regard to the display of the Ten Commandments, *Stone* has become the starting point for Ten Commandment display cases even in non-public school contexts.[3]

This Court could hardly have intended that *Stone* would be applied in a context outside the public school context. This case presents this Court with the opportunity to re-evaluate *Stone*, a weak precedent, and clarify the proper scope and applicability, if any, of *Stone* to cases involving the display of the Ten Commandments in non-public school contexts.[4]

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[3] *E.g.*, *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004); *Adland v. Russ*, 307 F.3d 471, 480-81 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *Books v. City of Elkhart*, 235 F.3d 292, 302-04 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *ACLU v. Hamilton County*, 202 F. Supp. 2d 757, 763 (E.D. Tenn. 2002); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 865-66 (S.D. Ind. 2000).

[4] At the time *Stone* was decided, there was little, if any, litigation over the public display of the Ten Commandments in non-public school contexts, and there was only one published federal circuit court decision on the subject, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), which the *Stone* majority did not even reference, further supporting the conclusion that *Stone* is intended to be limited to the public school context. The majority was aware of *Anderson*, which was cited by Justice Rehnquist in his dissenting opinion in *Stone*. *Stone*, 449 U.S. at 45.

1. *Stone v. Graham* Is A Weak Precedent.

Stone is a 5-to-4 per curiam opinion, which sets forth this Court's ruling in summary fashion. As Justices of this Court noted, *Stone* was a "cavalier summary reversal" of the courts of Kentucky that was done without the benefit of oral argument, briefing, or plenary consideration by this Court. *Stone*, 449 U.S. at 47 (Rehnquist, J., dissenting); *see also id.* at 43 (Burger, CJ., joined by Blackmun, J., dissenting); *id.* (Stewart, J., dissenting).

Indeed, this Court should not feel constrained to follow or apply *Stone* in deciding the subject appeal. By its very nature, *Stone* is a weak precedent. As this Court has explained, it is "less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998).

Reliance on *Stone* outside the public school context has limited, if any, value since the unique and particular circumstances of the public school context, which led to the holding in *Stone*, do not extend outside that context. This Court should make that clear to the lower courts.

The public school context in which the *Stone* majority considered the display of the Ten Commandments explains the majority's summary conclusions about the Decalogue's religious nature and its summary rejection of the secular purpose advanced by the Kentucky Legislature for displaying the Ten Commandments in those classrooms.

This Court always has been especially concerned about religious activities in public schools, a heightened concern that it does not extend beyond the public school context. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992)

("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 620 n.69 (1989) (explaining that although a public display of a Christmas tree and a menorah in a non-public school context was found to be constitutional, such a display located in a public school context would raise additional constitutional considerations since the Establishment Clause must be applied with a special sensitivity in that context).

The heightened concerns this Court has about anything religious in the public school setting, however, should not be applied to displays of the Ten Commandments in non-public school settings, where children are not compelled to be present as they are in a public school classroom where the Ten Commandments are posted alone as in *Stone*. *See Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1023 (Col. 1995) (en banc) (explaining that reliance on *Stone* is misplaced in analyzing the display of the Ten Commandments except when the Decalogue is displayed in a public school classroom, where students are compelled to attend and are easily influenced), *cert. denied,* 516 U.S. 1111 (1996); *see also City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) (noting that the concerns in *Stone* regarding the public school context do not apply outside that context).

2. The Ten Commandments Should Be Acknowledged In Public Whether Alone Or As Part Of A Broader Display.

Although originating from a religious text, the Ten Commandments are not as limited in scope as a reading of the *Stone's* majority opinion may suggest. This Court should make it clear to the lower courts that it did not intend in *Stone* to limit the importance of the Ten Commandments to being just a "sacred text" that lack secular applications. This Court should also make it clear that it did not intend to raise the presumption that the public display of the Ten Commandments violates the Establishment Clause even in a non-public school context.[5]

As has been repeatedly acknowledged, especially after the issuance of *Stone*, except by a majority of this Court (which should clearly make the acknowledgement) the Ten Commandments undeniably form the basis of the judicial code of Western Civilization, which is something that should be acknowledged in public. *See, e.g., City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) ("Undeniably ... the [Ten] Commandments have secular significance [besides being a sacred text] because they have made a substantial contribution to our secular legal codes."); *Books v. City of Elkhart,* 235 F.3d 292, 302

[5] Although in *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987), a public school case, this Court explained that it did not mean in *Stone* that "no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization," this limitation of *Stone* needs to be reiterated by this Court in the context of the display of the Ten Commandments in a non-public school setting.

(7th Cir. 2000) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society. . . ."), *cert. denied,* 532 U.S. 1058 (2001); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33-34 (10th Cir. 1973) (noting that the Ten Commandments have religious and secular attributes), *cert. denied*, 414 U.S. 879 (1973); *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 784 (E.D. Ky. 2002) ("[F]or good or bad, right or wrong, the Ten Commandments *did* have an influence upon the development of United States law. . . ."); *Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001) ("The 'Ten Commandments,' while a sacred text to some and an ethical code of conduct to others, is also a landmark in the history of the development of Western law."), *aff'd in part, rev'd in part*, 297 F.3d 995 (10th Cir. 2002); *Crockett v. Sorenson,* 568 F. Supp. 1422, 1428 (W.D. Va. 1983) ("[T]he Ten Commandments have had immeasurable effect on Anglo-American legal development."); *Colorado v. Freedom from Religion Found.,* 898 P.2d 1013, 1024 (Colo. 1995) (en banc) (noting "the historical fact that the Ten Commandments has served over time as a basis for our national law"), *cert. denied*, 516 U.S. 1111 (1996).

This Court should clearly acknowledge the contributions the Ten Commandments have made to the development of our law to ensure that there is no presumption, as *Stone* tends to engender, that there can be no secular purpose for the display of the Ten Commandments in public, even in a non-public school context.

Along those lines, because *Stone* pre-dates *Lynch v. Donnelly,* 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which are this Court's two

leading cases that provide the analytical framework for determining the constitutionality of government displays of items with religious connotations, this Court should clarify for the lower courts how *Stone* should be weighed, if at all, when analyzing the display of the Ten Commandments in non-public school contexts in light of *Lynch* and *Allegheny*.

In *Lynch* and *Allegheny*, this Court upheld the government display of religious symbols (the crèche and the menorah) as part of a broader display in a non-public school context. *Lynch,* 465 U.S. at 671-72, 687; *Allegheny,* 492 U.S. at 581-82, 621. Although in *Lynch* and *Allegheny*, religious objects (the crèche and the menorah) were permitted to be included in public displays, the same result does not generally occur when the Ten Commandments are involved, even though the Commandments have both sacred and secular attributes. This result can reasonably be attributed to the presumption in *Stone* against the public display of the Ten Commandments, no matter the secular purpose for the display. If a crèche and a menorah, both religious symbols, may be included in public displays, then the Ten Commandments, which have both sacred and secular attributes, should be permitted, whether displayed alone or as part of a broader display.

CONCLUSION

This Court should uphold the judgment of the lower court and rule in favor of respondents.

Respectfully submitted,

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